KOH HENG JIN HOLDINGS SDN BHD v. PHUAH BENG CHOOI & ANOR

COURT OF APPEAL, PUTRAJAYA
ALIZATUL KHAIR OSMAN JCA
ABDUL AZIZ ABDUL RAHIM JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: W-02(NCVC)(A)-1638-07-2013]
13 JANUARY 2016

LAND LAW: *Conveyancing – Transfer of property – Co-ownership – Application by majority share owners to compel co-owners to sell share in property – Absence of evidence that conditions for termination of co-proprietorship were satisfied – Whether court could exercise power to terminate co-proprietorship – Whether issue fell within ambit of 'in any cause or matter relating to land' under para. 3 of Schedule (Additional Powers of the High Court) of Courts of Judicature Act 1964 – National Land Code, ss. 145 & 417*

SUCCESSION: *Administration – Action for possession of land – Action by co-owner of undivided share of property against administrators of estate – Whether question pertaining to exercise of administrators' duties relevant – Whether co-owner beneficiary of estate – Whether had vested interest – Whether entitled to interfere in affairs of administrator and beneficiaries – Probate and Administration Act 1959, ss. 60 & 68*

The appellant ('the plaintiff') was a family company and was the registered owner of a 2/3 undivided share of the property, the subject matter of this appeal. Koh Heng Jin was the principal contributory and Managing Director of the plaintiff company. The respondents ('the defendants') were the administrators of the estate of Koh Hing ('the deceased'), the brother of Koh Heng Jin and the estate formed 1/3 of the undivided share of the property. The property had been occupied by Koh Heng Huat, the brother of Koh Heng Jin, without rental being collected for the past 25 years. Therefore, the plaintiff, as the majority share owner of the property, sent a notice to Koh Heng Huat stating its intention to impose a rental of RM30,000 per month failing which Koh Heng Huat was to vacate the property. Koh Heng Huat refused to enter into a tenancy agreement with the plaintiff or to vacate the property without the consent of the defendants or the beneficiaries of the estate of the deceased. The plaintiff then wrote to the defendants seeking their consent to create a tenancy and to impose rental on Koh Heng Huat, alternatively offering to purchase the defendants' 1/3 undivided share in the property. When the defendants failed to respond within the stipulated time, the plaintiff filed an originating summons ('OS'), *inter alia*, for an order to compel the defendants to sell their 1/3 share of the property to the plaintiff. The plaintiff filed the application pursuant to s. 25 read with para. 3 of the Schedule (Additional Powers of the High Court) of the Courts of Judicature Act 1964 ('the CJA') and ss. 145 and 417 of the National Land Code ('NLC')

and additionally cited O. 31 r. 1 of the Rules of the High Court 1980 ('RHC') and s. 60(4) of the Probate and Administration Act 1959 ('PAA') in the intitulement of the OS. The High Court dismissed the plaintiff's OS and hence, this appeal. The main issue for the court's determination was whether the court had the power to order the property to be sold to the plaintiff under s. 25(2) of the CJA read with para. 3 of the Schedule and O. 31 r. 1 of the RHC.

Held (dismissing appeal with costs)
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) The plaintiff's OS was strictly between the plaintiff and the defendants as co-owners and not as administrators. Therefore, the question of whether the defendants had discharged their duties as administrators of the estate of the deceased under the PAA, in particular, under s. 68 of the PAA was not relevant. Since the plaintiff was not a beneficiary of the estate and had no vested interest in the latter, the plaintiff had no right to interfere in the affairs of the defendants *qua* administrators and the beneficiaries and to raise issues pertaining to the administration of the deceased's estate, including the 1/3 undivided share in the property. In the circumstances, the plaintiff could not invoke ss. 60 and 68 of the PAA for the purpose of this application. Therefore, the submission on this issue ought to be disregarded. (paras 16 & 18-20)

(2) There was neither evidence of any request by the plaintiff to the defendants for the said property to be partitioned nor evidence of any refusal by the defendants to consent to the said partition. There was also no evidence from the State Director or the Land Administrator or from the planning authority confirming that the area of the proposed sub-divisional portion will be less than the minimum area prescribed under s. 136(1)(f) of the NLC. In the absence of such evidence, the conditions under which the court could exercise its power to terminate the co-proprietorship under s. 145(1) of the NLC and to make consequential order, *inter alia*, that the said property be sold, had not been satisfied. Therefore, the plaintiff's reliance on s. 145 of the NLC to terminate the co-proprietorship was misconceived. (paras 26-28)

(3) The phrases 'and in any cause or matter relating to land' in para. 3 and 'in any cause or matter relating to immoveable property' in O. 31 r. 1 of the RHC were not applicable in the present case as the said OS was not a cause or matter pertaining to property. The real issue in the present case was the issue of rental, which did not fall within the ambit of 'in any cause or matter relating to land'. The plaintiff was using the issue of rent as a camouflage to compel the defendants to sell their 1/3 undivided share in the said property to the plaintiff. In the circumstances, there was no merit in the plaintiff's OS. (paras 31, 33, 38, 40 & 42)

Bahasa Malaysia *Translations*

Perayu ('plaintiff') adalah syarikat keluarga dan pemilik berdaftar 2/3 bahagian hartanah yang tidak dipecahkan, iaitu hal perkara rayuan ini. Koh Heng Jin adalah penyumbang utama dan Pengarah Urusan syarikat plaintif. Responden-responden ('defendan-defendan') adalah pentadbir harta pusaka Koh Hing ('si mati'), abang Koh Heng Jin dan harta pusaka tersebut membentuk 1/3 bahagian hartanah yang tidak dipecahkan. Hartanah tersebut diduduki oleh Koh Heng Huat, adik Koh Heng Jin, tanpa pungutan sewa daripadanya selama 25 tahun. Oleh itu, plaintif, sebagai pemilik bahagian majoriti hartanah, memberi notis kepada Koh Heng Huat menyatakan niatnya untuk mengenakan sewa sebanyak RM30,000 sebulan dan jika gagal, Koh Heng Huat perlu mengosongkan hartanah tersebut. Walau bagaimanapun, Koh Heng Huat enggan memasuki perjanjian sewaan dengan plaintif atau mengosongkan hartanah tersebut tanpa persetujuan defendan-defendan atau benefisiari-benefisiari harta pusaka si mati. Plaintif menghantar surat kepada defendan-defendan, memohon persetujuan mereka untuk membentuk sewaan dan mengenakan sewa atas Koh Heng Huat, atau secara alternatif, menawarkan untuk membeli 1/3 bahagian defendan-defendan yang tidak berbelah bagi bahagian hartanah itu. Apabila defendan-defendan gagal menjawab dalam tempoh yang ditetapkan, plaintif memfailkan saman pemula ('SP'), antara lain, untuk perintah mendesak defendan-defendan menjual 1/3 bahagian hartanah mereka kepada plaintif. Plaintif memfailkan permohonan tersebut menurut s. 25 yang dibaca bersekali dengan perenggan 3 Jadual (Kuasa-kuasa Tambahan Mahkamah Tinggi) Akta Mahkamah Kehakiman 1964 ('AMK') dan ss. 145 dan 417 Kanun Tanah Negara ('KTN') dan secara tambahan, menyebut A. 31 k. 1 Kaedah-kaedah Mahkamah Tinggi ('KMT') dan s. 60(4) Akta Probet dan Pentadbiran 1959 ('APP') dalam intitulmen SP. Mahkamah Tinggi menolak SP plaintif dan dengan itu, rayuan ini. Isu utama bagi pertimbangan mahkamah adalah sama ada mahkamah mempunyai kuasa memerintahkan agar hartanah tersebut dijual kepada plaintif di bawah s. 25(2) AMK dibaca bersama-sama dengan perenggan 3 Jadual dan A. 31 k. 1 KMT.

Diputuskan (menolak rayuan dengan kos)
Oleh Alizatul Khair Osman HMR menyampaikan penghakiman mahkamah:

(1) Saman pemula plaintiff, adalah secara ketatnya, antara plaintif dan defendan-defendan sebagai pemilik bersama dan bukan sebagai pentadbir. Oleh itu, persoalan sama ada defendan-defendan telah melaksanakan tanggungjawab mereka sebagai pentadbir-pentadbir harta pusaka si mati di bawah APP, khususnya, di bawah s. 68 APP tidak relevan. Oleh sebab plaintif bukan benefisiari harta pusaka dan tidak mempunyai kepentingan yang terletakhak dalam harta pusaka, plaintif tidak berhak campur tangan dalam urusan defendan-defendan selaku

pentadbir dan benefisiari-benefisiari dan untuk membangkitkan isu berkaitan pentadbiran harta pusaka si mati, termasuk 1/3 bahagian hartanah yang tidak dipecahkan. Dalam keadaan tesebut, plaintif tidak boleh membangkitkan ss. 60 dan 68 APP bagi tujuan permohonan ini. Oleh itu, hujahan bagi isu ini wajar diketepikan.

(2) Tiada keterangan berkaitan apa-apa permintaan oleh plaintif kepada defendan-defendan bagi belah bagi hartanah tersebut atau keterangan berkaitan penolakan oleh defendan-defendan untuk menyetujui belah bagi tersebut. Tiada juga keterangan daripada Pengarah Negeri atau Pentadbir Tanah atau daripada pihak berkuasa pelan yang mengesahkan bahawa kawasan yang dicadangkan untuk belah bagi sub-bahagian kurang daripada kawasan minimum yang diperuntukkan di bawah s. 136(1)(f) KTN. Tanpa keterangan sedemikian, keadaan di mana mahkamah boleh melaksanakan kuasa untuk membatalkan milikan bersama di bawah s. 145(1) KTN dan membuat perintah berikutannya, antara lain, bahawa hartanah tersebut dijual, tidak dipenuhi. Oleh itu, sandaran plaintif pada s. 145 KTN untuk membatalkan milikan bersama adalah satu salah tanggapan.

(3) Frasa 'and in any cause or matter relating to land' dalam perenggan 3 dan 'in any cause or matter relating to immoveable property' dalam A. 31 k. 1 KMT tidak terpakai dalam kes ini kerana SP tersebut bukan kausa atau perkara berkaitan hartanah. Isu sebenar dalam kes ini adalah isu sewaan, yang tidak terangkum dalam 'in any cause or matter relating to land'. Plaintif menggunakan isu sewa sebagai samaran untuk mendesak defendan-defendan menjual 1/3 bahagian tidak dibelah bagi dalam hartanah tersebut kepada plaintif. Dalam hal keadaan tersebut, tiada merit dalam SP plaintif.

Case(s) referred to:

KK Kumaran v. TS Sambanthamurthi [1997] 2 CLJ Supp 26 HC ***(refd)***
Koh Boh Huat & 7 Ors v. Tan Niam Neo & Anor [2006] 1 LNS 177 HC ***(refd)***
Malayan Banking Bhd v. Zahari Ahmad [1987] 1 LNS 136 HC ***(refd)***
Rubyna Kaur Surinder Singh v. Jasbir Singh Harbajan Singh [2004] 1 CLJ 347 HC ***(refd)***
Setiawah @ Siti Hawa Abd Talib & Ors v. Kamaruddin Hj Abd Talib [2011] 1 LNS 41 HC ***(refd)***
Staines v. Staines (1886) Ch D 17 ***(refd)***
Tan Kok Chiang v. Tan Yaw Ti & Anor [2009] 1 LNS 711 HC ***(refd)***
Tong Hin Seong & Anor v. Yong Teik Seong [2003] 1 LNS 697 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2), First Schedule Para. 3
National Land Code, ss. 136(1)(f), 140, 141, 142, 143, 144, 145(1), (2), 417
Probate and Administration Act 1959, ss. 60(4), 68
Rules of Court 2012, O. 31 r. 1

A *For the appellant - M Pathmanathan (Eric Clement & Shirin Pathmanathan with him); M/s Abd Halim Ushah & Assocs*
For the 1st respondent - WP Leong; M/s WP Leong & Partners

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: 24NCVC-536-03-2013 (affirmed).]

B *Reported by S Barathi*

JUDGMENT

Alizatul Khair Osman JCA:

C **[1]** This is an appeal by the appellant (the plaintiff) against the decision of the learned Judicial Commissioner who had dismissed with costs the appellant's originating summons for an order *inter alia*, to compel the respondents (the defendants) to sell their 1/3 share of the property, (the subject matter of the application) to the appellant.

D **[2]** We had, after perusing the appeal records and upon considering the submissions of counsel both oral and written, decided unanimously to dismiss the appeal with costs. Our reasons appear below.

[3] For the purpose of this judgment the appellant and the respondents E will be referred to as plaintiff and defendants respectively.

Background Facts

[4] The plaintiff is a family company and the registered owner of a 2/3 undivided share in Lot 6, Seksyen 87A, Bandar Kuala Lumpur (No. 7-1, F Jalan Semarak, Kuala Lumpur) (the said property). As stated earlier the said property is the subject matter of the plaintiff's application in the High Court *vide* Saman Pemula No. 24 NCVC-536-03-2013 (the said OS).

[5] Koh Heng Jin @ Koh Heng Leong, 83, is the principal contributory and Managing Director of the plaintiff company.

G **[6]** The defendants are the administrators of the estate of Koh Hing @ Koh Heng Teik *vide* grant of letter of administration dated 3 December 1977. Koh Hing @ Koh Heng Teik (deceased) is Koh Heng Jin's brother.

The original shareholding of the said property was as follows:

H

Koh Heng Jin Holdings Sdn Bhd (plaintif)	-	1/3 share
Koh Hooi Chew Realty Sdn Bhd	-	1/3 share
Koh Hing @ Koh Heng Teik	-	1/3 share

In October 2009 Koh Hooi Chew Realty Sdn Bhd was wound up and the I liquidators sold Koh Hooi Chew Realty Sdn Bhd's 1/3 share in the said property by way of public tender.

The plaintiff was successful in its bid to purchase Kooi Hooi Chew Realty Sdn Bhd's 1/3 share at the purchase price of RM1,666,670 based on the valuation by the liquidator's valuer M/s Rahim & Co.

The plaintiff is presently the registered proprietor of 2/3 undivided share of the said property.

[7] The remaining 1/3 undivided share in the said property forms part of the estate of the deceased. The said 1/3 undivided share is being held by the defendants (as administrators) on behalf of the seven beneficiaries of the estate of the deceased (including the first defendant).

[8] The plaintiff and the defendants are therefore co-owners or co-proprietors of the said property with the plaintiff having 2/3 undivided share and the defendants 1/3 undivided share.

[9] It is not disputed that the said property is currently occupied by one, Koh Heng Huat without rental being collected for the last 25 years. The said Koh Heng Huat is the brother of Koh Heng Jin @ Koh Heng Leong (*supra*) and is the uncle of the six beneficiaries named in the estate of the deceased.

On 11 December 2012, the plaintiff as the majority 2/3 undivided share owner of the said property sent a notice to the said Koh Heng Huat stating its intention to impose rental of RM30,000 per month (RM20,000 for the plaintiff's 2/3 share) with effect from January 2013 failing which the said Koh Heng Huat was to vacate the property. The said Koh Heng Huat refused to enter into a tenancy agreement with the plaintiff or to vacate the said property without the consent of the defendants or the beneficiaries. The plaintiff through their solicitors then wrote to the defendants seeking their consent to create a tenancy and to impose rental on the said Koh Heng Huat, alternatively offering to purchase the defendants' 1/3 undivided share in the said property. (see plaintiff's letter dated 22 January 2013 at p. 91 of the record of appeal (ROA)). As the defendants failed to respond within the stipulated time, the plaintiff filed the said OS on 5 March 2013.

The Said OS

[10] The plaintiff's application, by way of OS is for the following orders:

(i) that the 1/3 share of Lot 6 Seksyen 87A, Bandar Kuala Lumpur (No. 7-1, Jalan Semarak, Kuala Lumpur) held by the Defendants be sold to the Plaintiff;

(ii) the purchase price shall be RM1,666,670.00;

(iii) the Defendants shall execute and forward the Sale and Purchase Agreement and the Memorandum of Transfer within 21 days of this Order to the Plaintiff's solicitor failing which the Senior Assistant Registrar of this Honourable Court be authorised to execute the Sale and Purchase Agreement and all other relevant documents necessary to complete the sale of the 1/3 share on behalf of the Defendants; and

(iv) the Defendants shall forward the Letter of Administration of the Estate of KOH HING @ KOH HENG TEIK (deceased) and all other documents to effect the sale within 21 days of this Order to the Plaintiff's solicitors; or

Alternatively, the plaintiff sought, *inter alia*, these orders:

(v) that the 1/3 of the market price of the said property be determined by Jones Lang Wootton Malaysia (registered valuers) and the valuation as determined shall bind both the Plaintiff and the defendant; and

(vi) the defendants shall execute the Sale and Purchase Agreement and the Memorandum of Transfer within 21 days from date of receipt of the valuation report from the Valuer to the Plaintiff's solicitor failing which the Senior Assistant Registrar of this Honourable Court be authorised to execute the Sale and Purchase Agreement and all other relevant documents necessary to complete the sale of the 1/3 share on behalf of the Defendants;

(vii) the Defendants shall forward the Letter of Administration of the Estate of KOH HING @ KOH HENG TEIK (deceased) and all other documents to effect the sale within 21 days of from date of receipt of the valuation report from the Valuer;

(viii) the fees and expenses for the appointment of the Valuer shall be borne equally between the Plaintiff and the Defendant;

[11] The grounds of the plaintiff's application are stated to be as follows:

(i) the Plaintiff as the 2/3 registered owner of the undivided share in the said property is unable to take control and/or manage the property without the consent of the Defendants being the 1/3 owner;

(ii) the Defendants being Administrators of the Estate have no interest in land but merely as to proceeds of sale of their portion;

(iii) the Plaintiff's offer to purchase the Defendants' portion at the market price would fulfil the need of the Defendants to conduct the affairs of the Estate in a fair and judicious manner and to end the Plaintiff's predicament in this property;

(iv) the land cannot be sub-divided;

(v) the solution offered by the Plaintiff is both just and expedient.

[12] The plaintiff purports to make this application under s. 25 read with para. 3 of the Schedule (Additional Powers of the High Court) of the Court of Judicature Act 1964 (CJA) and ss. 145 and 417 of the National Land Code (NLC).

[13] In addition the plaintiff also cited O. 31 r. 1 of the Rules of Court 2012 (RHC) and s. 60(4) of the Probate and Administration Act 1959 in the intitulement of the OS.

Decision Of The High Court

[14] The learned judge found, *inter alia*, the plaintiff's application under s. 25 and para 3 of the Schedule (Additional Powers of the High Court) of the CJA and ss. 145 and 417 of the NLC, to be without merit and dismissed the said OS with costs.

Our Decision

[15] As stated above, upon due consideration and deliberation, we had unanimously dismissed the appeal with costs and affirmed the learned Judicial Commissioner's decision.

[16] We would like to state at the outset that we agreed with the submission of learned counsel for the defendants that the plaintiff's said OS is strictly between the plaintiff and the defendants as co-owners, (not as administrators), therefore the question of whether the defendants have discharged their duties as administrators of the deceased's estate under the Probate and Administration Act 1959 (the said Act) in particular under s. 68 of the said Act is not relevant to the issue at hand.

[17] Similarly whether or not the defendants have the requisite power to purchase immoveable property under s. 60 of the said Act is also not relevant to the issue at hand. Whether or not the defendants have discharged their duties as administrators of the deceased's estate as required of them under the said Act or whether they have acted in breach of their duties as administrators by failing to administer the deceased's estate speedily and diligently as alleged by the plaintiff, is strictly a matter between the defendants and the beneficiaries of the estate of the deceased.

[18] The plaintiff is not a beneficiary of the estate of the deceased and has no vested interest in the latter. (see the letters of administration issued to the defendants, exh. PBC-1, pp. 94-98 of the ROA).

[19] The plaintiff therefore has no right to interfere in the affairs of the defendants *qua* administrator and the beneficiaries and raise issues pertaining to the administration of the deceased's estate (including the 1/3 undivided share in the said property).

[20] In the circumstances the plaintiff cannot invoke ss. 60 and 68 of the said Act for the purpose of this application and we therefore agree with learned counsel for the defendants that the plaintiff's submission on this issue ought to be disregarded.

[21] In our view the main issue before the court is whether the court has the power to order the said property to be sold to the plaintiff under s. 25(2) of the CJA read with para. 3 of the Schedule and O. 31 r. 1 of the RC.

[22] Section 25 (2) of the CJA reads as follows:

> Without prejudice to the generality of section (1) the High Court shall have additional powers set out in the schedule.
>
> Paragraph 3 of the Schedule stipulates as follows:
>
> Partition of land.
>
> 3. Power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions.

[23] The provisions relating to partition and the power to terminate the co-proprietorship of land vested in two or more persons is governed by ss. 140-145 of the NLC. For our purpose the relevant section is s. 145 of the NLC.

[24] Section 145 of the NLC confers power on the court to terminate a co-proprietorship in the two situations set out in s. 145(1).

Section 145 (1) states as follows:

> Where, in the case of any land vested in co-proprietors:
>
> (a) any of the co-proprietors will neither join in, nor consent to the making of, an application for partition under this Chapter, or
>
> (b) by reason of the operation of paragraph (f) of sub-section (1) of section 136 (as applied by section 141), partition of the land between all of the co-proprietors is incapable of being approved under this Chapter,
>
> the Court, subject to and in accordance with the provisions of any law for the time being in force relating to civil procedure, may, on the application of any of the co-proprietors, make such order as it may think just for the purpose of enabling the co-proprietorship to be terminated.

Section 136(1)(f) of the NLC stipulates the minimum area of any sub-divisional portion in the case of land subject to the category of agriculture or for agricultural purpose which shall be not less than two-fifth of a hectare and in any other case not less than the minimum area for land of the class or description in question as determined by the planning authority for the area in which the land is situated.

Section 141 of the NLC provides that no partition shall be approved by the State Director or the Land Administrator as the case may be unless the conditions specified in s. 136(1) of the NLC are *mutatis mutandis* satisfied.

[25] On this issue, it was the defendants' submission that as the power of the court to terminate the co-proprietorship under s. 145 of the NLC only arises if any of the co-proprietors refuses to join in or to consent to an application for partition. No such issue arises here as the plaintiff had never

requested the defendants to consent to the partitioning of the property. The plaintiff did not adduce any evidence by way of correspondence between the parties or of any meeting or discussion to prove that such request for partition was made to the defendants.

[26] We agreed with the submission of learned counsel for the defendants that the plaintiff's reliance on s. 145 of the NLC to terminate the co-proprietorship is misconceived as firstly, there is no evidence of any request by the plaintiff to the defendants for the said property to be partitioned let alone evidence of any refusal by the defendants to consent to the partition.

[27] Secondly, there was also no evidence either by way of an affidavit or a letter from the State Director or the Land Administrator, as the case may be, or from the planning authority of the area in which the said property is situated confirming that the area of the proposed sub-divisional portion will be less than the minimum area prescribed under s. 136(1)(f) of the NLC.

[28] In the absence of any such evidence the conditions under which the court can exercise its power to terminate the co-proprietorship under s. 145(1) of the NLC and to make consequential orders, *inter alia*, that the said property be sold (s. 145(2) of the NLC) have not been satisfied.

[29] Learned counsel to the plaintiff however referred to the phrase "and in any cause or matter relating to land" in para. 3 of the Schedule (the said para. 3).

Counsel argued that the phrase confers power on the court to order the sale of land in any cause or matter relating to land in any action apart from an action for partition of land. In other words the power of the court to order such sale is not restricted only to any action for partition of land but also in any cause or matter relating to land, if the court deems it necessary or expedient to do so. The phrase in any cause or matter relating to land is a standalone provision.

[30] Therefore even if the present case does not fall within the circumstances prescribed under s. 145(1) of the NLC for the court to exercise its power under the said subsection to terminate the co-proprietorship and order the defendants share of the said property to be sold to the plaintiff, the court still have the power under the said para. 3 to make such order if the court finds it necessary or expedient to do so. As for the requirement under the proviso to s. 25(2) of the CJA, that the additional power under the schedule shall be exercised only in accordance with any written law or rules of court relating to the same, learned counsel for the plaintiff referred to O. 31 r. 1 of the RC, as decided in *Tong Hin Seong & Anor v. Yong Teik Seong* [2003] 1 LNS 697; [2003] 6 MLJ 38, *KK Kumaran v. TS Sambanthamurthi* [1997] 2 CLJ Supp 26; [1996] 3 MLJ 309 and *Malayan Banking Bhd v. Zahari Ahmad* [1987] 1 LNS 136.

Order 31 r. 1 of the RHC is almost identical with the said para. 3 and reads thus:

> Where in any cause or matter relating to any immoveable property it appears necessary or expedient for the purpose of the cause or matter that the property or any part thereof **should be sold**, the court may order that property or part to be sold ...
>
> (emphasis added)

[31] We agree that the phrase "in any cause or matter relating to land" in the said para. 3 confers power on the court to order the land or any part thereof to be sold, in actions other than for partition of land. However in our view the phrase "and in any cause or matter relating to land" in the said para. 3 and "in any cause or matter relating to immoveable property" in O. 31 r. 1 of the RC is not applicable in the present case as the said OS is not a cause or matter pertaining to property within the context of O. 31 r. 1 (per Suriyadi J in *Rubyna Kaur Surinder Singh v. Jasbir Singh Harbajan Singh* [2004] 1 CLJ 347; [2003] 6 MLJ 753).

[32] The said OS was filed pursuant to the refusal of the said Koh Heng Huat to accept the plaintiff's proposal for the creation of a tenancy and the imposition of rental in the sum of the RM30,000, and the subsequent non-response of the defendants to the aforesaid proposal.

[33] Although the plaintiff's prayer in the said OS is for an order that the defendants' 1/3 undivided share in the said property be sold and transferred to the plaintiff under s. 25 of the CJA read together with the said para. 3 and O. 31 r. 1 of the RC, it can be seen from the exchange of letters between the parties and the said Koh Heng Huat that the real issue here is the issue of rental.

[34] The plaintiff's solicitor's letter dated 11 December 2012 to the said Koh Heng Huat reads as follows:

> We are instructed by our client that you have lived in the property known as Lot 6 seksyen 87A (No. 7-1 Jalan Semarak, Kuala Lumpur) rent free as the property was co-owned by three parties each have one third (1/3) share and the said parties could not reach consensus on the rental to impose on you as the tenant.
>
> We are instructed that our client purchased one of the parties one third (1/3) share and effectively from November 2012 they now have two-third (2/3) share in the said property.
>
> Our client thus instructs that now having majority share in the said property they are desirous of imposing a rental of RM30,000.00 per month commencing 1.01.2013. The rental imposed we are instructed is the market rate of the rentals collected in the adjoining properties.
>
> TAKE NOTICE therefore that you are to pay our client a sum of RM20,000.00 (RM30,000.00 X2/3) as rental from 1.01.2013.

> In the event you are not agreeable to the rental imposed you may vacate the said property and grant our client vacant possession by 1.01.2013 or by the date mutually agreeable by both parties.

[35] The said Koh Heng Huat in his reply dated 18 January 2013 issued through his solicitor's questioned the right of the plaintiff to issue such a letter and the amount of rental proposal as can be seen from the following excerpt of his letter:

> For the record your client maybe 2/3 undivided share of the property that has never been identified cannot exercise his rights as if he is the sole and only legal proprietor of the property WITHOUT the consent and agreement of the owner of the balance 1/3 undivided owner. Thus, your client's claim is premature and lack legal standing.
>
> Secondly, please enlighten us in what basis your client imposes a rental of RM30,000.00 per month. The reason of imposing the rate based on what is alleged by your client as the market rate of rentals collected in the adjoining properties cannot be accepted by our client as there is no evidence provided/given to support your client's your client's contention...

[36] Pursuant to the said Koh Heng Huat's reply the plaintiff through their solicitors on 22 January 2013 issued to the defendants a letter, stating, *inter alia*:

> We are instructed by our client that Mr Koh Heng Huat *vide* his solicitors letter dated 18.01.2012 put our client on notice that our client cannot claim rental for the abovesaid premise without your consent as the proprietor of the 1/3 share.
>
> A copy of the said solicitor's letter is enclosed for your attention.
>
> As such, kindly let us have your consent in writing that you are agreeable that Mr. Koh Heng Huat pay rental in the sum of RM30,000.00 per month within five (5) days from the date hereof.
>
> In the event you do not desire the imposition of the rental, our client instructs that they are willing to purchase your 1/3 share in order to arrest this impasse.
>
> TAKE NOTICE that in the event you do not consent to the rental being imposed and/or if we do not receive a reply from you within the stipulated period as abovestated we have strict instruction to institute proceedings to compel you to sell your 1/3 ownership to our client. …

[37] When the defendants failed to reply within the time stipulated in the letter the plaintiff filed the said OS.

In *Staines v. Staines* (1886) Ch D 177, an action was brought by the infant heir-at-law (by a next friend) of an intestate against the widow, who was the administratrix claiming accounts of the personal estate and of the rents and profits of the real estate received by the defendants.

When the action came up for hearing the court was asked under r. 1 of O. L1 to make an order for sale of the real estate.

It was held by North J that this was not "a cause or matter relating to real estate" within the meaning of the rule and that the court could not make an order for the sale of the real estate." ...

Based on the aforesaid case a claim for rental and profits is not a "cause or matter relating to real estate".

[38] Thus the plaintiff's said OS which is essentially a claim for rental as evidenced by the exchange of letters (*supra*), does not fall within the ambit of "any cause or matter relating to land (or immoveable property as it is worded in O. 31 r. 1 of the RC).

In fact as submitted by learned counsel for the defendants the plaintiff here is in a worse position compared to *Staines v. Staines* (*supra*) as the defendants here are not the party owing any rental to the plaintiff.

[39] The authorities cited by learned counsel for the plaintiff in support of the claim *viz*, *KK Kumaran v. TS Sambanthamurthi* (*supra*) [1997] 2 CLJ Supp 26; [1996] 3 MLJ 309, *Koh Boh Huat & 7 Ors v. Tan Niam Neo & Anor* [2006] 1 LNS 177, *Tan Kok Chiang v. Tan Yaw Ti & Anor* [2009] 1 LNS 711, *Tong Hin Seong & Anor v. Yong Teik Seong* (*supra*), *Setiawah @ Siti Hawa Abd Talib & Ors v. Kamaruddin Hj Abd Talib* [2011] 1 LNS 41, can be distinguished as in the main they relate to disputes pertaining to the land itself . In the case of *Setiawah @ Siti Hawa Abd Talib* (*supra*) it was not disputed that the land could not be partitioned. Hence the applicability of the said para. 3 is not an issue.

[40] In this regard we agreed with the defendants submission that the plaintiff here is using the issue of rent as a camouflage to compel the defendants to sell their 1/3 undivided share in the said property to the plaintiff. As observed by the learned JC:

> Dari keterangan-keterangan afidavit plaintif–plaintif saya membuat kesimpulan bahawa Plaintiff tidak *mempunyai niat menuntut sewaan dari Koh Heng Huat tetapi menggunakan isu sewaan untuk memaksa defendan-defendan menjual 1/3 bahagian hartanah tersebut kepada plaintif.* Tindakan plaintif menggunakan mahkamah adalah satu penyalahgunaan proses Mahkamah untuk mencapai hujahnya.
>
> (emphasis added)

This is clear from the plaintiff's letter of 22 January 2013 to the defendants (*supra*).

[41] The defendants also pointed out that although the intitulement in the said OS states "Dalam perkara cadangan menjual 1/3 bahagian defendan kepada plantif" there is no such matter as "cadangan menjual 1/3 bahagian

defendan kepada plaintif" for the court to determine as such a "cadangan" never existed. This is evident from a perusal of the cause papers and the correspondence between the parties where such a proposal was never raised nor initiated by the defendants' at all material times.

[42] For the above reasons we agree with the learned JC's finding that there was no merit in the plaintiff's OS and that it should be dismissed with costs.

[43] We accordingly affirm her decision and dismiss the appeal with costs and order the deposit to be refunded.